RECORD
AND
BRIEFS

No. 15-866

IN THE

Supreme Court of the United States

STAR ATHLETICA, L.L.C.,

Petitioner,

v.

VARSITY BRANDS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF COUNCIL OF FASHION DESIGNERS OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Council of Fashion Designers of America, Inc. ("CFDA") is a not-for-profit trade association whose membership consists of over 500 of America's foremost fashion and accessory designers as well as many newer and smaller designers.

Founded in 1962, the CFDA's goals are to further the position of fashion design as a recognized branch of American art and culture, to advance its artistic and professional standards, to establish and maintain a code of ethics and practices of mutual benefit in professional, public, and trade relations, and to promote and improve public understanding and appreciation of the fashion arts through leadership in quality and taste. In furtherance of the CFDA's mission to strengthen the impact of American fashion in the global economy, the CFDA provides educational and professional development programming, hosts the annual CFDA Fashion Awards, presenting awards for design excellence in recognition of outstanding contributions made to American fashion. The CFDA also fosters emerging American design talent through design school scholarships, the CFDA's Fashion Incubator, as well as the CFDA/*Vogue* Fashion Fund, which was established in 2003 to provide recipients with significant financial awards and business mentoring.

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1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief, in whole or in part, and that no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Both Petitioner and Respondent consented to the filing of *amicus* briefs.

The CFDA's members have a strong interest in the issues presented in this case. The ultimate decision of this Court will have a broad-reaching effect on fashion designers and their creative endeavors.

SUMMARY OF ARGUMENT

The Sixth Circuit's holding reaffirms the well-established rule extending copyright protection to original two-dimensional designs appearing on useful articles. While the CFDA acknowledges that clothing and most apparel are not eligible for copyright protection, the ever-growing numbers of American fashion designers depend upon copyright protection of their original designs. The copyrightability framework endorsed by Petitioner Star Athletica, L.L.C. ("Petitioner"), and its amici, on the other hand, would have a swift and deleterious effect on United States fashion industry, leaving fashion designers defenseless against copyists and, thus, undermining their incentive and ability to continue pursuit of creating innovative, original designs. The CFDA, therefore, urges this Court to affirm the Sixth Circuit's decision in favor of Respondents.

ARGUMENT

I. Well-Established Copyright Protection is Vital to the Continued Growth of the United States Fashion Industry and Fashion Design Innovation

A. The United States Has Become a World Leader in Fashion Design

"It is clear Congress intended the scope of the copyright statute to include more than the traditional fine arts." *Mazer v. Stein*, 347 U.S. 201, 213 (1954). In the more than seventy years since *Mazer*, fashion has grown into a multi-trillion dollar global industry and fashion design has risen to the status of fine art.[2] *See* Joint Econ. Comm., 114th Cong., *The New Economy of Fashion*, 1 (Feb. 2016) ("*New Economy of Fashion*"). Americans spend nearly $370 billion annually on apparel and footwear, and the U.S. fashion industry—including retailers, manufacturers, designers, marketing, specialized media, transportation,

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2. Indeed, three of the top ten most visited exhibitions in the 146-year history of The Metropolitan Museum of Art focused on fashion design: *Alexander McQueen: Savage Beauty* attracted 661,509 visitors in 2011; *China: Through the Looking Glass* attracted 815,992 visitors in 2015; and this year's exhibition, *Manus x Machina: Fashion in an Age of Technology* brought in 752,995 visitors. *See* Press Release, *The Metropolitan Museum of Art, The Met Extends Hours for Final Weekend of Manus x Machina: Fashion in the Age of Technology* (Aug. 25, 2016), available at http://www.metmuseum.org/press/news/2016/manus-x-machina-final-hours; Press Release, *752,995 Visitors to Costume Institute's Manus x Machina Make It the 7th Most Visited Exhibition in The Met's History* (Sept. 6, 2016), available at http://www.metmuseum.org/press/news/2016/manus-x-machina-final-attendance.

and wholesalers—employs more than 1.8 million people in the United States. *See New Economy of Fashion*, *supra*, at 1.

Perhaps even more dramatic than the growth of the U.S. fashion industry is the U.S. industry's shift over the past century from manufacturing to design—from an importer of design to exporter. In 1931, New York's Garment District boasted the highest concentration of clothing manufacturers in the world. "Many of these jobs have since moved offshore, [most dramatically] [o]ver the past quarter-century, [as] U.S. employment in the apparel manufacturing industry has declined sharply, from almost 940,000 in 1990 to about 143,000 in 2014." Joint Econ. Comm., 114th Cong., *The Economic Impact of the Fashion Industry*, 1 (Sept. 2015).

During this same period, the United States has grown into a "world leader in fashion design, rivaling other major international hubs like Paris, Milan and London." *New Economy of Fashion*, *supra*, at 1. "[A]t the heart of the industry's creative process" and fueling its recent growth are the nearly 18,000 fashion designers working in the United States, whose numbers have grown by almost 50% in the past ten years alone. *Id.* Long gone are the days when "American designers were regarded as anonymous craftsmen who used their sartorial skills to copy Parisian designs for the American consumer." Katelyn N. Andrews, *The Most Fascinating Kind of Art: Fashion Design Protection As A Moral Right*, 2 NYU J. Intell. Prop. & Ent. L. 188, 209 (2012). While many are familiar only with the most famous and successful names in fashion—Diane Von Furstenberg, Calvin Klein, Ralph Lauren, *et al.*—the median annual wage for fashion designers was

$63,670 in May 2015. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2016-17 Edition*, Fashion Designers, available at http://www.bls.gov/ooh/arts-and-design/fashion-designers.htm.

Fashion design is a burgeoning and highly competitive profession, requiring advanced degrees and training. Currently, more than 200 postsecondary schools across the country offer fashion-related programs and prepare students for jobs in the fashion industry. *See* Joint Econ. Comm., 114th Cong., *The Economic Impact of the Fashion Industry*, 4 (Sept. 2015).

B. Fashion Design Piracy Threatens Innovation

Changes in technology, such as robotic manufacturing, digital photography and video, 3D printing, and the explosion in e-commerce, have opened up new opportunities for smaller, less-established designers and brands. *New Economy of Fashion*, *supra*, at 10. While such technological innovations have spurred the burgeoning numbers of independent fashion designers, such technology leaves them increasingly vulnerable to copying by "fast-fashion" retailers and manufacturers, able to produce high-volume, low-cost, line-for-line duplicates of original designs that often enter the market weeks, even months, before the originals.

While copying in fashion is not a new problem, over the past twenty-five years, new technologies have allowed for copying at a greater scale, lower costs, and increasing speed. As one designer explained: "Digital photographs from a runway show in New York or a red carpet in Hollywood can be uploaded to the Internet within

minutes, the 360 degrees images viewed at a factory in China, and copies offered for sale online within days—months before the designer is able to deliver the original garments to stores." *Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the H. Subcomm. on Intellectual Prop., Competition, & the Internet*, 112th Cong. 4-5 (2011) (Statement of Lazaro Hernandez, designer and co-founder of Proenza Schouler).

For many fast-fashion copyists, brazen piracy has become their business model. As Seema Anand, owner of Simonia Fashions, freely told the *New York Times*, "If I see something on Style.com, all I have to do is e-mail the picture to my factory and say, 'I want something similar, or a silhouette made just like this,'" and "[t]he factory, in Jaipur, India, can deliver stores a knockoff months before the designer version." Eric Wilson, *Before Model Can Turn Around, Knockoffs Fly*, N.Y. Times, Sept. 4, 2007, at A1. "At the factory in Jaipur the company contracts with 2,000 workers who specialize in pattern making, design and tailoring, and are equipped with computer programs that approximate the design of a garment from a Web image without the need to pull apart the seams." *Id.* Not only can such companies beat an original design to market, but their low-cost, high-scale, rapid copying model affords them the ability to "simply target creative designers most successful models." *A Bill To Provide Protection for Fashion Design: Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 79 (2006) (statement of Susan Scafidi, Visiting Professor, Fordham Law School, Associate Professor, Southern Methodist University)

Should the scope of copyright protection be further limited, as argued by the Petitioner here, the most severe consequences would befall emerging fashion designers "who every day lose orders and potentially [their] entire businesses." *See Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the H. Subcomm. on Intellectual Prop., Competition, & the Internet*, 112th Cong. 14 (2011) (Testimony of Lazaro Hernandez, designer and co-founder of Proenza Schouler) ("Hernandez Testimony").

> Emerging designers do not have the advantages [of more established famous fashion firms]. Their products are not well enough recognized to qualify for trademark or trade dress protection, nor do they have the money to advertise and reinforce their brand image. But what these designers do have to offer consumers is their innovative designs. They cannot command the same prices as the famous luxury firms. Thus, emerging designers are more likely to be in competition with their copyists as their consumer bases are more likely to overlap. A design that retails for hundreds instead of thousands is within the reach of many consumers who might well opt for the still less expensive knockoff. Thus, knockoffs are particularly devastating for emerging and mid-range designers who face significant entry barriers and struggle to stay in business.

Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the H. Subcomm. on Intellectual Prop., Competition, & the Internet, 112th

Cong. 14 (2011) (Testimony of Jeannie Suk, Professor Law, Harvard Law School).

As with other creative industries, fashion design involves a substantial investment of money and time. Fashion design, as characterized by fashion designer Narciso Rodriguez, "is an art that must be learned, just like painting, sculpting, or writing":

> It took nearly $50,000 in loans and three years to get my degree from the Parsons School of Design in New York. My parents couldn't afford my tuition, so I took out school loans to pay the $15,000 a year. Today Tuition is $32,000. After graduating, fashion designers usually train as apprentices.... [Only after] years as an apprentice and designing for someone else, I started my own company in 1998.

See Design Law – Are Special Provisions Needed to Protect Unique Industries: Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Prop. Of the H. Comm on the Judiciary, 110th Cong. 22 (Feb 14, 2008) (Statement of fashion designer Narciso Rodriguez) ("Rodriguez Statement").

For those independent designers fortunate enough to have established their own business, each collection requires an even greater investment of financial capital and creative toil:

> To design and fabricate my 250-piece collection it takes six to twelve months. The fall and spring runway shows cost on average $800,000 to stage. The fabric another $800,000, the workroom that

> develops the patterns and garments another $1,500,000. The travel budget for design and fabric development is $350,000 and marketing is another $2,500,000.[3]

Rodriguez Statement, *supra*, at 22.[4] Original fashion design further entails the cost of trial and error, involving various creative choices and experimentation regarding the materials and construction of a piece of clothing.

Copyists, in contrast, by avoiding the costs and risks of design, earn huge profits by selling their high-volume pirated designs at a discount to the original. The availability of these discounted copies results in a market reduction in sales of the original. *See, e.g.*, Amy Kover, *That Looks Familiar. Didn't I Design It?*, N.Y. Times, June 19, 2005, § 3, at 34 (describing accessory designer's drop in monthly revenue from $50,000 to $10,000, following release of imitation). Examples of such piracy abound. When Narciso Rodriguez designed the wedding gown worn by Carolyn Bessette Kennedy in 1996, the dress became one of the most copied of the following decade. While "pirates sold around 7 million or 8 million copies [of the dress]," Rodriguez has stated, "I sold 40." *See* Rodriguez Statement, *supra*, at 22.

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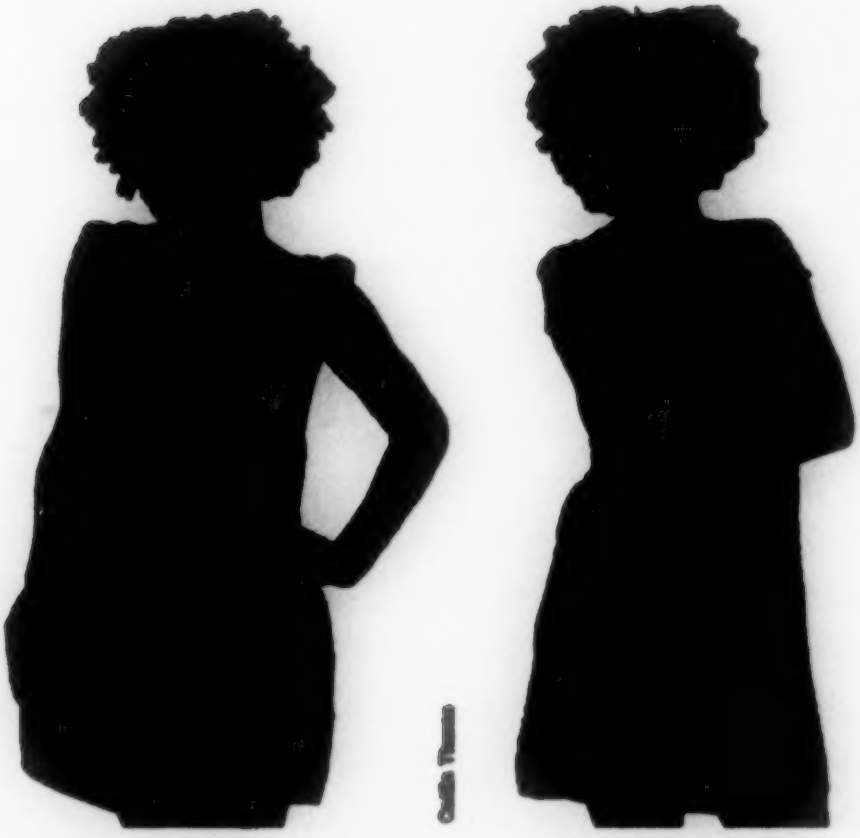
3. *Cf.* Dhani Mau, *How Much It Costs to Show at New York Fashion Week*, Fashionista (Feb. 5, 2014) (estimating that $200,000 as reasonable cost to produce fashion shows at New York's Fashion Week), http://fashionista.com/2014/02/new-york-fashion-week-cost.

4. *See also*, Amy L. Landers, *The Anti-Economy of Fashion: An Openwork Approach to Intellectual Property Protection*, 24 Fordham Intell. Prop. Media & Ent. L.J. 427, 489-98 (2004) (describing and collecting examples of expenses related to starting a fashion line).

ILLUS. 1. Top Row: Copied designs at issue in *Trovata, Inc. v. Forever 21, Inc.*, No. 07-CV-01196 (C.D. Cal. Oct. 15, 2007). Bottom Row: Original designs from Trovata. (available at http://nymag.com/thecut/2009/10/trovatas_suit_against_forever.html (last visited Sept. 15, 2016)).



ILLUS. 2. Left: Diane von Furstenberg original design. Right: Dress from Forever 21. (available at http://jezebel.com/5822762/how-forever-21-keeps-getting-away-with-designer-knockoffs (last visited Sept. 20, 2016)).

Under Petitioner's proposed approach to copyright protection, fashion designers would be additionally deprived of rights in derivative works. *See* 17 U.S.C. § 106(2) (giving the individual the right to "prepare derivative works based on copyrighted work"). While designers may develop a name for themselves through high-end collections, selling in low volume at a high price, "the designer never recoups development costs for the

designs because he or she sells so few garments." *See* Hernandez Testimony, *supra*. In fact, fashion designers often are able to recoup their investment and design costs only when they later enter licensing deals with large retailers, which allow designers to "offer their own affordable ready-to-wear lines based on those high-end collections. They then can lower the prices at which their designs are sold because they sell more of them. Just like other businesses—[fashion design is] dependent on volume. Design piracy makes it difficult for a designer to move from higher priced fashion to developing affordable renditions for a wider audience. It also makes it impossible to sell collections to stores when the clothes have already been knocked off. Licensing deals are then no longer an option." *Id.*

II. Absent Copyright Protection, Fashion Designers Lack an Adequate Alternative Means of Legal Recourse to Protect Original Designs from Copyists

To be clear, the CFDA recognizes that most apparel is not and should not be protected by copyright, i.e., button-down collars or blazers. The limited scope of protection afforded fabric design and other design elements under copyright law, however, is of vital importance to the fashion industry. Indeed, scholars have noted that copyright protection "is currently a powerful tool to succeed against copiers," as fashion designers have grown increasingly savvy regarding the enforcement of their fabric design copyrights. *See* Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in The European Community*, 8 Nw. J. Tach.

& Intell. Prop. 147, 154 (Spring 2010). Should this Court adopt Petitioner's proposed separability analysis and roll back these long-established copyright protections, fashion designers would be deprived of the best means of legal recourse against the unauthorized use and copying of the artistic elements of their original designs.

Fashion designers who have sought alternative protection for their original work through trademark and patent laws have had limited success. These laws provide inadequate protection and are furthermore, for the majority of independent fashion designers, unfeasible. Compared to the relatively straightforward process of copyright registration—requiring filing a short application and paying a nominal fee[5]—trademark and patent registration entail a lengthy and expensive process as well as a high bar to meet the statutory requirements. Even if a designer is able to register their designs with the United States Patent and Trademark Office, litigation alleging trademark or patent violations requires more time and resources than a small designer has to spare, especially given the unpredictable chances of success.[6]

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5. Filing fee for basic online copyright registration is as low as $35. See United States Copyright Office, *Fees*, http://copyright.gov/docs/fees.html (last visited Sept. 16, 2016).

6. *See* Tedmond Wong, *To Copy or Not to Copy, That Is the Question: The Game Theory Approach to Protecting Fashion Designs*, 160 U. Pa. L. Rev. 1139, 1153 (2012) ("[T]here have been few notable legal victories against the duplication of the exact shape and appearance of fashion designs. This is most likely due to the lack of intellectual property protection for these elements. Fashion designers have used the limited forms of legal protection available to seek redress against copiers--through trade dress claims, for example--and have only achieved limited success.")

Thus, Petitioner's suggestion that protection for the design of useful articles should be "channeled" to other intellectual property regimes is simply unworkable. *See* Petitioner's Br. 24-25, 30.

A. Copyright Protection

The constitutional purpose of copyright law is to promote and to protect the development of creative industries by ensuring that creators are the ones who receive the benefit of their own intellectual and artistic investments. Although courts have long held that garments, as useful articles, are not copyrightable, design elements that are physically or conceptually separable from the article's utilitarian function may warrant copyright protection. *See Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989), *citing Fashion Originators Guild v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940) (L. Hand, J.), *aff'd*, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941); *see also Mazer*, 347 U.S. at 217. Under the doctrine of conceptual separability, courts have extended copyright protection to fabric designs, jewelry, belt buckles, lace embroidery, even the "entire exterior design" of a slipper in the shape of a bear's paw.[7] The Sixth

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7. *See Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (extending copyright protection to "squirrel" and "leaf" appliques on children's sweaters); *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 762–65 (2d Cir.1992) (protecting fabric designs as "writings"); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980) (citing a belt buckle's "primary ornamental aspect" as sufficient demonstration of conceptual separability); *Animal Fair, Inc. v. AMFESCO Indus., Inc.*, 620 F. Supp. 175, 187–88 (D. Minn. 1985), *aff'd sub nom. Animal Fair v. Amfesco Indus.*, 794 F.2d 678 (8th Cir. 1986); *Eve of Milady v. Impression Bridal, Inc.* ("Eve of Milady I"), 957 F.Supp. 484, 489 (S.D.N.Y.1997) (protecting

Circuit's ruling in the instant case, extending copyright protection to the geometric designs on cheerleader uniforms, is consistent with these rulings.

B. Trademark and Trade Dress Law

Trademark protection under the Lanham Act provides the trademark holder with exclusive rights to distinguish the holder's goods from the competition's through the use of an identifying mark that has come to define the holder's brand, e.g., logos, label names, and symbols. Trademark protection, however, extends only as far as the product's mark. Designers, thus, have no recourse against a copyist who produces a duplicate design without the trademark.[8] Not only does trademark law provide inadequate protection from copyists, but it also remains unavailable to new and emerging designers who have yet to establish a recognizable brand—sometimes referred to as a fashion designer's DNA—and lack extensive budgets to develop a sufficient level of market recognition.

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fabric designs); *Scarves by Vera, Inc. v. United Merchs. & Mfrs.*, 173 F. Supp. 625, 627 (S.D.N.Y. 1959) (holding that silk-screen paintings applied to ladies blouses); *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142, 143 (S.D.N.Y. 1959) (enforcing copyright protection for "design printed upon dress fabric").

8. Prohibitions against counterfeiting, which involves the "knowing use of a spurious mark which is identical with or substantially indistinguishable from a registered trademark, in connection with the trafficking of counterfeit merchandise," Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, Tit. II, §1502(a), 98 Stat. 2178 (1984), are strictly enforced. Counterfeiting, however, first requires design piracy: "before a counterfeited trademark is applied to a bag or piece of clothing its design must first be copied. A copy of a design is really a counterfeit without the label." *See* Beltrametti, *supra*, at 150.

Trade dress protection, likewise, remains exclusive to only the most well-established brands in the fashion industry, which have acquired an immediately recognizable style and thus the requisite "secondary meaning" necessary to secure protection.

C. Design Patents

At first glance, design patents, which protect the "configuration or shape of an article, to the surface ornamentation applied to an article, or to the combination of configuration and surface ornamentation," may appear to be a promising avenue for fashion design protection. In practice, however, only certain fashion designs, such as handbags and shoes, meet the Patent Act's statutory threshold of being "novel, non-obvious and non-functional ornamental design for an article of manufacture." 35 U.S.C. §§ 171-73 (1988). Furthermore, even if a designer is able to meet the statutory requirements, the time and expense of obtaining patent protection render it grossly impractical. In 2015, the average time for an initial determination of patentability was 17.3 months, during which time a designer might release up to ten collections. *See* U.S. Patent & Trademark Office, Performance and Accountability Report Fiscal Year 2015 (2015), http://www.uspto.gov/sites/default/files/documents/USPTOFY15PAR.pdf. Even when a designer goes through the time and expense of obtaining a design patent, they remain vulnerable to copyists.[9]

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9. *See* Lauren Indvik, *Why Patent-Holding Designs Still Get Knocked Off: A Case Study with Alexander Wang*, Fashionista (Dec. 18, 2013), http://fashionista.com/2013/12/why-fashion-designers-get-knocked-off-alexander-wang.

III. This Court Should Reject Petitioner's Proposed Separability "Test"

The approach to copyrightability proposed by Petitioner is anathema to the very idea of copyright protection, as expressed by this Court in *Mazer v. Stein*:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."
>
> *Mazer v. Stein*, 347 U.S. at 219 (1954).

Petitioner admits that its approach would "undoubtedly" result in "a sub-optimal prophylactic rule." *See* Petitioner's Br. 39 (quotation marks and citation omitted). Particularly invidious to fashion design innovation is the presumption against design protection inherent in Petitioner's proposed framework, which Petitioner acknowledges would create a limited and unpredictable copyright protection for design elements. *See* Petitioner's Br. 22, 39 ("The result at times may be that features one would expect are copyrightable are not."). Such a result would have an immediate and marked effect on the fashion industry and the burgeoning numbers of fashion designers for whom copyright protection remains the only feasible and effective safeguard against copyists.

We, therefore, urge this Court to reject Petitioner's proposed analysis of conceptual separability and preserve the well-established copyright protections for certain aspects of fashion design in light of the need for certainty amongst creative designers and the vital importance of copyright protection to fashion designers and to the continued growth of the United States fashion industry.

CONCLUSION

The CFDA respectfully requests this Court uphold the Circuit Court's ruling in favor of Respondents.

Respectfully submitted,

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